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6 **PARTIES RECEIVING THIS MOTION SHOULD LOCATE THEIR**
7 **NAMES AND CONTRACTS IN THE LISTED MOTION**

8 **UNITED STATES BANKRUPTCY COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 In re

12 HYPERIKON, INC.

13 Debtor
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Bankruptcy Case No. 21-01776-LT-7

TRUSTEE'S MOTION AND
MEMORANDUM OF POINT AND
AUTHORITIES IN SUPPORT OF
MOTION FOR AN ORDER:

- 1) AUTHORIZING REJECTION
OF CERTAIN UNEXPIRED
NONRESIDENTIAL LEASES
AND SUBLEASES, AND
- 2) ABANDONING CERTAIN
PERSONAL PROPERTY OF
NEGLIGIBLE VALUE OR
BURDENSOME TO THE
BANKRUPTCY ESTATE

[OMNIBUS MOTION NO. 1]

Date: August 4, 2021

Time: 2:00 p.m.

Dept: 3/ Room 129

Judge: Laura Taylor

26 Leonard J. Ackerman, the duly appointed Chapter 7 Trustee in the above-
27
28 entitled matter, hereby moves the Court for an order authorizing the rejection of

1 the certain unexpired leases and subleases, effective as of the dates requested
2 below, and abandoning certain personal property, and files the following
3 Memorandum of Points and Authorities in Support of his Motion:
4

5 Leases to be Rejected:

6 A. Real Property Non-Residential Leases And Subleases
7

8 1. With respect to the property commonly known as **4850 Indianapolis Road**,
9 Whitestone, Indiana:

- 10 a) Lease between Indiana Becknell Investors 2011, LLC, as lessor, on the
11 one hand, and the Debtor, as lessee, on the other hand, dated August 1,
12 2017, (Exhibit A), and which apparently assigned, via an Assignment and
13 Assumption of Leases to **SREIT 4820 Indianapolis Drive, LLC**, (Exhibit B),
14
15 b) Sublease between the Debtor, as sublessor, on the one hand, and
16 **HomeGoods, Inc.**, as sublessee on the other hand, dated November 2, 2020,
17
18 (Exhibit C).
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20 2. With respect to the property commonly known as **8515 Miramar Place**, San
21 Diego, California:

- 22 a) Air Commercial Real Estate Associaton Standard Industrial/Commercial
23 Multi-Tenant Lease-Net, dated August 12, 2016 between **MGM Partnership**, as
24 Lessor, on the one hand, and the Debtor, Lessee, on the other hand, (Exhibit D),
25
26 and
27
28

1 b) AIRCR Standard Sublease between the Debtor, as Sublessor, on the one
2 hand, and **Crest Beverage, LLC**, on the other hand, (Exhibit E)

3 Copies of the above referenced exhibits are attached as Exhibits A to
4 E, respectively, to the Declaration of Leonard J. Ackerman, Trustee,
5 (“Ackerman Declaration”), filed in support of this motion.
6

7
8 I. INTRODUCTION

9 According to the Debtor’s schedules, the Debtor is the lessee at two
10 different warehouse locations, (nonresidential real property), - one in Indiana and
11 one in San Diego. The warehouse location in Indiana is commonly known as 4850
12 S. Indianapolis Road, Whitestone, Indiana. The warehouse location in San Diego is
13 commonly known as 8515 Miramar Place. The Debtor has, in turn, sublet each of
14 these warehouses to a third party- in each case for an amount over and above the
15 base rent under the master lease. The Debtor is, itself, a sublessee for a third
16 warehouse located on West 81st Street in Indianapolis, Indiana. This motion does
17 not address the W. 81st Street location.
18

19
20 The bankruptcy petition was filed on April 30, 2021. (Doc. 1). The
21 Debtor’s subtenant at the 4850 S. Indianapolis Road property, Home Goods, Inc.,
22 apparently paid the sublease rent that would have been due May 1, 2021, early and
23 pre-petition, and the Debtor apparently commingled those funds with its other
24 funds.
25

26 After the filing of the petition, the landlord for the 4850 S. Indianapolis
27 Drive property filed an emergency motion to compel the payment of post- petition
28 administrative rent. (Docs. 18 and 23).

1 On June 7, 2021, the Bankruptcy Court entered an order requiring the
2 Debtor's subtenant, Home Goods, Inc., to pay the rent that would be due under the
3 sublease on June 1, 2021, directly to the Landlord's counsel, who was authorized
4 to disburse the monies owing to his client for the June rent, including both base
5 rent and additional rent, and hold any additional sums in his Client Trust Account,
6 pending further order of the Court. (Doc. 39).
7

8 On June 1, 2021, counsel for the Landlord informed the Trustee's counsel that
9 once he received the June 1, 2021 sublease rent from the subtenant, he would
10 disburse \$57,369.98 to his client, and retain the balance in his Client Trust
11 Account. The Trustee understands that the landlord's counsel did, indeed, receive
12 the June 1, 2021 rent and proceed to disburse funds accordingly.
13

14 By order entered on June 16, 2021, (Doc. 56), the Bankruptcy Court extended
15 the provisions of the June 7, 2021 order as to the June rent, to the rent due under
16 the sublease for July and August 2021.
17

18 II. RELIEF REQUESTED

19 Section 365(a) of the Bankruptcy Code provides, in full, as
20 follows:

21 "Except as provided in sections 765 and 766 of this title
22 and in subsections (b), (c), and (d) of this section, the
23 trustee, subject to the court's approval, may assume or
24 reject any executory contract or unexpired lease of the
25 debtor."

26 Section 554 (a) of the Bankruptcy Code provides, in full,
27 as follows:
28

1 “After notice and a hearing, the trustee may abandon any property
2 of the estate that is burdensome to the estate or that is of
3 inconsequential value and benefit to the estate.”

4 By this motion, the Trustee seeks to reject both the leases and the subleases for
5 both the Miramar Place location and the S. Indianapolis Road location.

6 By this motion, the Trustee also seeks to abandon certain personal property
7 located at the S. Indianapolis Road location.
8

9 The leases and subleases are more specifically described in Attachment A to the
10 Notice of this motion, and the personal property to be abandoned is more
11 specifically described in Attachment B to the Notice of this motion. The leases and
12 subleases, themselves, are attached as Exhibits A through E to the Declaration of
13 Leonard Ackerman, Trustee, filed in support of this motion. (“Ackerman
14 Declaration”).
15
16

17 III. THE RELIEF REQUESTED IS IN THE BEST INTEREST OF 18 CREDITORS

19 For all the reasons set out below, the motion should be granted. The
20 touchstone governing the assumption or rejection of leases and executory contracts
21 is the “business judgment” test, See, e.g., Mission Product Holdings, Inc. v.
22 Tempnology, LLC 139 U.S. 1652, 1658 (2019). The business judgment test affords
23 deference, (id.), to the decision of the trustee. For all the reasons set out in the
24 Ackerman Declaration, the Trustee, in his business judgment, has determined that
25 assumption of the leases and the subleases, which are the subject of this motion,
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27
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1 are not in the best interests of the bankruptcy estate. Accordingly, the Trustee
2 submits that the motion should be granted.
3

4 A. The Lease and Sublease for the S. Indianapolis Road Property
5 Should Be Rejected
6

7 The Trustee would have to assume the master lease for the S. Indianapolis
8 property in order to assume and perform under the sublease or provide adequate
9 assurance of future performance. As set out in paragraphs 1-11 of the Ackerman
10 Declaration, the cost to the bankruptcy estate to assume the master lease exceeds
11 the income that the bankruptcy estate would expect to receive under the sublease,
12 especially when one considers that the bankruptcy estate likely would have to
13 return the \$129,200 security deposit to the subtenant, upon expiration of the
14 sublease term. The Debtor has indicated that it commingled the security deposit
15 with other funds upon receipt.
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17

18 Accordingly, because the bankruptcy estate is highly unlikely to realize
19 any economic benefit whatsoever from the assumption of the lease or sublease
20 and, in fact, is likely to incur additional administrative debt, the Trustee requests
21 approval to reject both the lease and sublease.
22

23 The Trustee requests that the rejection be deemed effective as of the date
24 of the filing of the petition, or, if not, no later than June 1, 2021, or at the very
25 latest, the date of the filing of this motion. The Ninth Circuit Court of Appeals
26 has held the court has the equitable power to order a rejection to operate
27 retroactively. (cert. den. 56 U.S. 814 (2005) In Re At Home Corporation, 392 F.3d
28

1 1064, 1072 (9th Cir. 2004) (finding that rejection of unexpired non-residential
2 lease to motion filing date was not an abuse of discretion).

3
4 The Trustee submits that, in light of the Bankruptcy Court's order
5 providing for the subtenant to pay the rent due under the sublease directly to
6 counsel for the landlord, it is equitable and appropriate that the lease rejection of
7 both the lease and sublease be effective no later than June 1, 2021, so that the
8 bankruptcy estate's liability for administrative rent, if any, ends as of May 31,
9 2021. The Trustee submits that any such administrative claim would likely be
10 offset by rents paid by the subtenant.
11

12
13 B. The Lease and Sublease for the Miramar Place Property Should Be
14 Rejected
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16 As with the S. Indianapolis lease, the Trustee would have to assume the
17 master lease for the Miramar Place property in order to assume and perform under
18 the sublease. As set out in paragraphs 12-20 of the Ackerman Declaration, the cost
19 to the bankruptcy estate to assume the master lease also exceeds the income that
20 the estate would anticipate receiving under the sublease, especially when one
21 considers that the bankruptcy estate would have to return the \$64,388.72 security
22 deposit to the subtenant, upon expiration of the sublease term. As with the
23 Indianapolis Road lease, assumption of the lease would simply result in
24 administrative expense to the estate, and likely generate no economic benefit.
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2 C. It is in the Best Interest of Creditors to Abandon the Personal
3 Property Located at the S. Indianapolis Road Location

4 As set out in paragraph 11 of the Ackerman Declaration, the Trustee, based on
5 the information currently available to him, believes that the property listed on
6 Schedule B to the HomeGoods sublease is either of nominal value or burdensome
7 to the estate and therefore seeks to abandon all such items.

8
9 The Trustee reserves the right to withdraw this part of the motion if additional
10 information becomes available before the hearing on the motion that warrants a
11 change in his position.
12

13 IV. CONCLUSION

14 For all the foregoing reasons, the Trustee respectfully requests that his
15 motion be granted and the leases and subleases described above, be deemed
16 rejected by the Trustee under Section 365(a) of the Bankruptcy Code, at the latest,
17 as of the date of the filing of this motion but, preferably, as of the filing of the
18 petition.
19

20 For all the reasons set out above, the personal property set out on Attachment B
21 to the Notice of Motion, located at the S. Indianapolis Drive location, should be
22 abandoned.
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1 Finally, the Trustee requests that the 14 day stay period set out in Federal Rule
2 of Bankruptcy Procedure 6004(h), if and to the extent it may be applicable,
3 bewaived.

4 Date: June 23, 2021

KIRBY & McGUINN, A P.C.

6 By: /s/ Roberta S. Robinson
7 Roberta S. Robinson, Attorneys
8 for Leonard J. Ackerman,
9 Trustee

10 Alphabetical listing of parties per FRBP 6006:

- 11 1. Crest Beverage, LLC-Sublease-Ex. E to Ackerman Declaration
- 12 2. HomeGoods, Inc.-Sublease-Exhibit C to Ackerman Declaration
- 13 3. MGM Partnership- Lease- Ex. D to Ackerman Declaration
- 14 4. SREIT 4820 Indianapolis Drive LLC- Lease- Exhibit A to Ackerman Declaration